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GROUND WATER RIGHTS IN OHIO

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"The good old rule
Sufficeth them, the simple plan
That they should take who have the power,
And they should keep who can."

The good old rule pertaining to ground water was thrown out by the Ohio Supreme Court in December 1984. Until recently ground water was governed by the philosophy of: if you had the power you had the water.

The Ohio Supreme Court has overruled the doctrine dealing with ground water that had been in effect for 125 years. In overruling Frazier v. Brown, 12 Ohio St. 294 (1861), the Court rejected the absolute ownership doctrine as it applies to ground water. The Court held that the "mysterious and occult" description of ground water flow does not describe or recognize the present state of scientific advancement.

In Cline v. American Aggregates, 15 Ohio St. 3d 384 (1984), the Ohio Supreme Court adopted Section 858, Restatement of the Law 2d, Torts, as the common law of Ohio. The Court found the reasonable use doctrine to be much more equitable in the resolution of ground water conflicts than the prior English rule of absolute ownership.

The old case law did not recognize a cause for legal action for indiscriminate use of ground water or for the lowering of

water tables. The new Ohio law applied to ground water issues is one of reasonable use.

Ground water, also referred to in several cases as percolating waters, can be defined as water located under the surface of the land in question; the water has no definite channel and does not form part of any known watercourse.¹ The Restatement's definition is "water that naturally lies or flows under the surface of the earth."² Justice Holmes in his concurrence in Cline defines percolating as "subsurface water without any permanent, distinct or definite channel..."³ Professor Paul L. Wright notes that underground water is presumed to be percolating unless it is proved that an underground stream exists. If the courses of the channels in which subsurface water flow are unknown or unascertainable, the waters are treated as percolating.⁴

Usuable ground water is found in what are called "aquifers" which generally consist of sand, gravel, porous sandstone or limestone which is fractured or partially dissolved. Most aquifers form an underground basin or pool in which the water collects, saturating the aquifer formation up to a certain level called the water table. The water table fluctuates up and down with input into the aquifer from rain, user activity or surface water such as streams, lakes or runoff.

¹Black's Law Dictionary, 5th ed.

²RS 845

³Cline @ 504

⁴Water Rights in Ohio, Paul L. Wright, Extension Economist, Agricultural Law, The Ohio State University (1985).

In Ohio, the recent years have brought an expanding awareness and utilization of ground water supplies. There are four major groups of users: agricultural, domestic, municipal and industrial. Ohio courts, and in some respect the Ohio legislature, are being called to address the problem of ground water use and to examine public policy in allocating ground water among the four competing in-state users, as well as to consider outside-the-state-border bids for water.

The problem arises when one user begins pumping from a well which prevents either 1) water from reaching the well of another user, or 2) lowers the water table or artesian pressure enough so that the second user can not continue with her present equipment or procedures to bring the same amount of water to the surface that she was accustomed to, or 3) the quality of water being brought to the surface is radically changed to render it unusable by the second user without a change in equipment.

Ohio's common law absolute ownership rule 1861 - 1984:
The English Rule.

The rule of absolute ownership stems from the common law principle established in England by the case Acton v. Blumdel.⁵ This rule gave the landowner complete freedom to withdraw and use ground water. Ground water is the absolute property of the owner, just as the land is and the owner may do as he pleases with the water regardless of the effect upon his neighbors. This rule is a rule of capture -- whoever could bring the water to the

⁵Acton v. Blumdel, (Exch. 1843), 12 M. & W. 324, 152 Eng. Rep. 1223.

surface of his land owned it. Ohio adopted this rule in Frazier⁶ and followed it for 123 years.

Modified American Reasonable Use Doctrine -- The New Ohio Rule

The new standard for Ohio is paragraph 1 of Section 858 of the Restatement below. Whether paragraph 2 was also meant to apply in Ohio will have to be litigated. For the purposes of this article, given the Ohio Supreme Courts willingness to adopt paragraph 1, it will be assumed that paragraph 2 may also apply.

Section 858. Liability for Use of Ground Water

1) A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure,

b) the withdrawal of ground water exceeds the proprietor's share of the annual supply or total store of ground water, or

c) the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.

2) The determination of liability under clauses (a), (b), and (c) of Subsection (1) is governed by the principles stated in Section 850 to 857.

Analysis of the New Rule and Its Effect On Ohio Farmers

The new law provides a three-part test for farmers or landowners. Groundwater may be withdrawn and used for beneficial purposes if:

1) the withdrawal does not unreasonably cause harm to

⁶Frazier

neighboring landowners through the lowering of the water table or the reduction of artesian pressure.

2) if it does not exceed the landowner's reasonable share of the annual supply or total store of ground water or

3) if it does not have a direct or substantial effect upon a watercourse or lake.

As already noted, the problem is answering the question of what is reasonable or unreasonable. A dairy cow drinks a substantial amount of water; when a problem arises between a competing home and a dairy for limited water the question becomes more apparent: Who gets the water?

What Happened in the Cline Case?

The case in which the Ohio Supreme Court adopted the Restatement position (Cline) gives some insight and can be related to a farm situation by analogy. The case was brought to court by 26 landowners alleging that their entire domestic water needs are supplied by wells located on their properties. The landowners further alleged that their properties, as well as the defendant quarrying operation, overlay a well-defined semi-artesian aquifer composed of glacial outwash till resting upon a bed of limestone rock. The landowners claimed, and the Ohio Supreme Court agreed, that the quarry which had been pumping water in the area since 1971 unreasonably caused dewatering and pollution of the landowner's wells.

Relating this case to a farm situation can be done with a minimum of analogy. A dairy farmer sells off some of his road

frontage property for house lots; houses are built and wells are drilled. The water table goes down and a suit results. Although many homes and farms are provided water by rural water services, the situation can easily occur. Another disturbing point, not examined by this paper is how Cline is going to affect rural water or municipal water suppliers. Many of them draw their water supplies from wells and consequently from ground water and then pipe the water to the users. The decision in Cline may very well affect this use.

Who gets the water: The court's view under the Restatement

Under the Restatement and in Ohio domestic purposes receive preferential treatment. Domestic purposes include: human drinking water, cooking, bathing, laundry, sanitation and other household purposes. Domestic purposes do not include the watering of herds or flocks of livestock or the irrigation of crops.

The interests of three different groups or individuals are considered: 1) the farmer using the ground water, 2) the landowner harmed or complaining of harm, and 3) society as a whole.

The Problem: What is Reasonable?

The reasonableness of a use of water by a farmer or any other landowner upon a conflict will be determined by a court or jury. The court (or jury) will consider a number of different factors. By considering some of these factors, litigation may possibly be avoided. But, in Ohio, we must be aware that the

Ohio Supreme Court has not yet determined what they will consider reasonable or unreasonable in the use of ground water.

If we assume that the Ohio Supreme Court will adopt paragraph 2 of Section 858 laid out earlier in this paper, then Section 850A of the Restatement can be used to identify some factors applied by the courts in determining reasonableness.

The court or jury will look at nine basic factors in deciding which parties' interest is most reasonable. These nine factors can be grouped into three categories:

- 1) The purpose, suitability, social and economic value of the use,
- 2) The practicality of avoiding the harm by adjusting the needs or methods of use of either the farmer or the person bringing the complaint,
- 3) The protection of existing values and the justice of requiring the farmer to bear the loss.

The judge or the jury will weigh these three categories and make a determination as to which interest is most reasonable. Judgement will then be rendered upon that determination. Each situation will be judged on its own merits.

Conclusion

Landowners must be aware that using ground water indiscriminately may result in a lawsuit. Ohio courts will award damages for the unreasonable use of ground water and in these times no one can afford a damage award much less the legal fees to contest the use of ground water for the watering of livestock or irrigation of crops. By keeping good farm records, being aware of your neighbor's needs and uses of water, and keeping current of the status of your areas water table you may avoid costly litigation. Zoning and/or land use planning by the community will help to

avoid the overuse of ground water supplies.

Finally, it must be noted that this paper has not addressed many other ground water problems which farmers and landowners should be aware of and concerned about. For example the pollution of ground water supplies and the use of ground water in times of little rainfall.